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No. 85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
AND COX CABLEVISION CORPORATION,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

Under historic arrangement, public utilities have granted cable television operators licenses to attach wires to surplus space on utility poles. By the 1978 Pole Attachment Act, 47 U.S.C. § 224, Congress authorized the Federal Communications Commission to regulate the rates, terms, and conditions imposed by utilities on cable operators for this service. The questions presented are:

I. Does pole attachment rate regulation constitute a taking *per se* as a government-compelled permanent physical occupation of property where

- the regulated property is public utility plant already subject to permanent physical occupations at regulated rates as the *quid pro quo* for the utility's government-authorized monopoly;
- the utility may reclaim the surplus pole space occupied by the cable operator whenever needed for utility service; and
- the utility voluntarily entered its pole attachment arrangements?

II. May Congress authorize an administrative agency to determine, pursuant to statutory guidelines, just compensation for a taking under the Fifth Amendment to the Constitution, subject to judicial review?

PARTIES TO THE PROCEEDINGS

The Court consolidated this proceeding (No. 85-1660) with *Federal Communications Commission, et al.* v. *Florida Power Corp., et al.* (No. 85-1658), a separate appeal from the same decision below. Respondents before the Eleventh Circuit and Appellants in this Court in No. 85-1658 are the Federal Communications Commission and the United States of America. Intervenors on behalf of Respondents before the Eleventh Circuit and Appellants in this Court in No. 85-1660 are Group W Cable, Inc.; National Cable Television Association, Inc.; and Cox Cablevision Corporation.* Intervenor on behalf of Respondents before the Eleventh Circuit and

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* *Statement pursuant to this Court's Rule 28.1*: Group W Cable, Inc., is owned by a consortium consisting of the following five members, no one of which owns a controlling share: American Television and Communications Corporation; Century Southwest Cable Television, Inc.; Comcast Corporation; Daniels & Associates, Inc.; and Tele-Communications, Inc. The following are less-than-wholly-owned subsidiaries of Group W Cable: Cable TV General, Inc.; Grosse Pointe Cable, Inc.; and Group W Cable of Columbia Heights/Hilltop, Inc.

Cox Cablevision Corporation is a wholly owned subsidiary of Cox Cable Communications, Inc., which in turn is wholly controlled by Cox Communications, Inc., which in turn is a wholly owned subsidiary of Cox Enterprises, Inc., a privately held corporation.

National Cable Television Association, Inc., is a non-profit trade association primarily of cable television operators, with associate membership of programmers and suppliers. It considers its membership list to be proprietary and confidential, but will endeavor to provide a list of members under seal upon request of this Court.

Appellee supporting Appellants in this Court is Acton Corporation.**

Petitioner before the Eleventh Circuit and Appellee in this Court in both proceedings is Florida Power Corporation. Intervenors on behalf of Petitioner before the Eleventh Circuit and Appellees in this Court in both proceedings are Tampa Electric Company, Mississippi Power & Light Company, Alabama Power Company, and Arizona Public Service Company.

** Acton filed no notice of appeal or jurisdictional statement and is therefore an Appellee under this Court's Rule 10.4.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	3
Factual Background	3
The Proceedings Below	14
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. Regulation Of Utility Poles Under The Pole Attachment Act Does Not Effect A Taking	18
A. Pole Attachment Regulation Constitutes Proper Regulation of Utility Facilities and Guarantees Florida Power a Constitutional Rate of Return	18
B. *Loretto*'s *Per Se* Test Is Not Satisfied Here Because Florida Power's Pole Space Has Not Been Permanently Occupied	24
C. The Act Effects No Taking Because Florida Power Voluntarily Permitted the Pole Attachments at Issue, Knowing That They Would Be Subject to FCC Regulation	28
II. Congress May Authorize An Administrative Agency To Determine Just Compensation For A Taking, Subject To Judicial Review	31
CONCLUSION	38

TABLE OF AUTHORITIES

CASES: Page

Alabama Power Co. v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985) 10, 11, 34

Alabama Public Service Commission v. *Southern Railway*, 341 U.S. 341 (1951) 22

American-Hawaiian Steamship Co. v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955) 36

American Paper Institute, Inc. v. *American Electric Power Service Corp.*, 461 U.S. 402 (1983) 19

Armstrong v. *United States*, 364 U.S. 40 (1960) ... 30

Bauman v. *Ross*, 167 U.S. 548 (1897) 32, 34

Bell Telephone Co. of Pennsylvania v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) 19

Better T.V., Inc. of Dutchess County, N.Y., 31 F.C.C.2d 939 (1971), *modified on other grounds*, 34 F.C.C.2d 142 (1972) 8-9

Board of Public Utility Commissioners v. *New York Telephone Co.*, 271 U.S. 23 (1926) 21

Broadcast Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 24

Cablevision of Augusta, Inc. v. *Georgia Power Co.*, File No. PA-83-0013, FCC Mimeo No. 3314 (FCC Common Carrier Bureau April 5, 1984) 10

California Water and Telephone Co., 64 F.C.C.2d 753 (1977) 9

Chicago & North Western Transportation Co. v. *United States*, 678 F.2d 665 (7th Cir. 1982) 33

Connolly v. *Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018 (1986) 22-23, 30-31

Table of Authorities-Continued

	Page
Crane v. *Hahlo*, 258 U.S. 142 (1922)	32
Denver Union Stock Yard Co. v. *United States*, 304 U.S. 470 (1938)	20-21
Fisher v. *City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, 106 S. Ct. 1045 (1986)	28
Florida Power Corp. v. *FCC*, 772 F.2d 1537 (11th Cir. 1985) (per curiam)	*passim*
Flynn v. *City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981)	28
FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942)	21
Gainesville Utilities Department v. *Florida Power Corp.*, 402 U.S. 515 (1971)	18-19
General Telephone Co. of the Southwest v. *United States*, 449 F.2d 846 (5th Cir. 1971)	8, 19
George v. *Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635 (1914)	33
Guardband Decision, 12 F.C.C.2d 841, *recon. denied*, 14 F.C.C.2d 269 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969)	19
Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U.S. 498 (1942)	19
In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Notice of Proposed Rulemaking, 68 F.C.C.2d 3 (1978)	4, 10-12, 26
In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—First Report and Order, 68 F.C.C.2d 1585 (1978)	6, 11, 26, 31

Table of Authorities-Continued

Page

In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59 (1979), *modified on other grounds*, 77 F.C.C.2d 187 (1980) 6, 11

In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Memorandum Opinion and Order, 77 F.C.C.2d 187 (1980) 5, 7

In re Application of Ohio Edison Co. for an Increase in Rates, Case Nos. 81-1171-EL-AIR, 82-559-EL-AAM, (Ohio P.U.C. November 3, 1982) ... 13

In re Petition To Adopt Rules Concerning Usable Space on Utility Poles, 56 Rad. Reg. 2d (P & F) 707 (1984) 6

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 22-23

Kansas City Power & Light Co. v. *State Corp. Commission*, 238 Kan. 842, 715 P.2d 19 (1986) 19

Latvian State Cargo & Passenger Steamship Line v. *United States*, 88 F. Supp. 290 (Ct. Cl. 1950) 33

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685 (1897) 33

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 15-18, 22-28, 30, 34

Loretto v. *Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983) 34

Los Angeles Gas & Electric Corp. v. *Railroad Commission*, 289 U.S. 287 (1933) 22

Louisiana Public Service Commission v. *FCC*, 106 S. Ct. 1890 (1986) 7

MacDonald, Sommer & Frates v. *Yolo County*, 54 U.S.L.W. 4782 (U.S. June 25, 1986) 23, 32-33

Table of Authorities-Continued

Page

Marin Municipal Water District v. *Marin Water & Power Co.*, 178 Cal. 308, 173 P. 469 (1918) 33

MCI Telecommunications Corp. v. *FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) 19

Midland Realty Co. v. *Kansas City Power & Light Co.*, 300 U.S. 109 (1937) 28-29

Miller v. *United States*, 620 F.2d 812 (Ct. Cl. 1980) 35, 36

Monongahela Navigation Co. v. *United States*, 148 U.S. 312 (1893) 35, 36

Monogahela Power Co. v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (per curiam) 11, 33

Munn v. *Illinois*, 94 U.S. 113 (1877) 18

Nash v. *City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed for want of substantial federal question*, 105 S. Ct. 1740 (1985) 28

National Association of Greeting Card Publishers v. *United States Postal Service*, 462 U.S. 810 (1983) 23

Nebbia v. *New York*, 291 U.S. 502 (1934) 18

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 18

Panhandle Eastern Pipe Line Co. v. *FERC*, 777 F.2d 739 (D.C. Cir. 1985) 20, 22

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 (1978) 20, 23

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 20

Princeton Cablevision, Inc. v. *Union Valley Corp.*, 195 N.J. Super. 257, 478 A.2d 1234 (1983) .. 34

Table of Authorities-Continued

Page

PruneYard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 23

Regional Rail Reorgnization Act Cases, 419 U.S. 102 (1974) 36

Rivera v. *R. Cobian Chinea & Co.*, 181 F.2d 974 (1st Cir. 1950) 27-28

Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 22-23, 29, 31, 37

Southern Pacific Transportation Co. v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1171 (1985) 19

St. Louis v. *Western Union Telegraph Co.*, 148 U.S. 92 (1893) 26

State ex. rel. Andrews v. *City of Oshkosh*, 84 Wis. 548, 54 N.W. 1095 (1893) 33-34

State v. *Heppenheimer*, 54 N.J.L. 268, 23 A. 664 (1893) 33

TeleCable Corp., 19 F.C.C.2d 574 (1969) 9

Terminal Plaza Corp. v. *City & County of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986) 28

Texas Power & Light Co. v. *FCC*, 784 F.2d 1265 (5th Cir. 1986) 11

Thomas v. *Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325 (1985) 36

Trans World Airlines, Inc. v. *City & County of San Francisco*, 228 F.2d 473 (9th Cir. 1955), *cert. denied*, 351 U.S. 919 (1956) 29

Troy, Ltd. v. *Renna*, 727 F.2d 287 (3d Cir. 1984) 27, 34-35

United States v. *Commodities Trading Corp.*, 339 U.S. 121 (1950) 33

United States v. *Cors*, 337 U.S. 325 (1949) 34

Table of Authorities-Continued

	Page
United States v. *15.3 Acres of Land*, 154 F. Supp. 770 (M.D. Pa. 1957), *rev'd*, 264 F.2d 112 (3d Cir.), *cert. denied*, 361 U.S. 819 (1959)	36
United States v. *Hess*, 71 F.2d 78 (8th Cir. 1934)	33
United States v. *Jones*, 109 U.S. 513 (1883)	33
United States v. *Terminal Railroad Association*, 224 U.S. 383 (1912)	19
United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972)	24
United Telephone Co. of Pennsylvania, 40 F.C.C.2d 359 (1973)	8
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	23
West v. *Chesapeake & Potomac Telephone Co.*, 295 U.S. 662 (1935)	22
CONSTITUTIONAL PROVISIONS AND STATUTES:	
U.S. Const. amend. V	*passim*
5 U.S.C. § 706(2)	31
28 U.S.C. § 1252	3
28 U.S.C. § 2342(1)	2, 31
47 U.S.C. § 224(a)(4)	4
47 U.S.C. § 224(c) (Supp. II 1984)	10
47 U.S.C. § 224(d)	10
47 U.S.C. § 224(d)(1)	10
47 U.S.C. § 402(a)	2, 31
Cable Communications Policy Act of 1984, Pub. L. No. 98-549 § 2, 98 Stat. 2779, 2786 (1984)(codified at 47 U.S.C. § 541 (Supp. II 1984))	4

Table of Authorities-Continued

Page

Cable Communications Policy Act of 1984, Pub. L. No. 98-549 § 4, 98 Stat. 2779, 2801-02 (1984)(codified at 47 U.S.C. § 224(c) (Supp. II 1984)) 11

Cal. Pub. Util. Code § 767.5 (Deering Supp. 1986) 13

Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1087, 1091 (1982) 10

Fla. Stat. Ann. § 361.01 (West 1968) 20

N.Y. Pub. Serv. Law § 119-a (McKinney Supp. 1986) 13

Pole Attachment Act (Communications Act Amendments of 1978), Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C.A. § 224 (West. Supp. 1985)) ..... *passim*

REGULATIONS:

47 C.F.R. § 1.1402(e) 6

47 C.F.R. § 1.1404(g)(10) 9

47 C.F.R. § 1.1411 31

LEGISLATIVE MATERIALS:

Cable Television Regulation Oversight: Hearings Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) 9

Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 95th Cong., 1st Sess. (1977) 5-9, 13

123 Cong. Rec. 16694 (1977) 8

123 Cong. Rec. 16695 (1977) 5

Table of Authorities-Continued

	Page
123 Cong. Rec. 16694-95, 35006-08 (1977)	9
The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. (1973)	33
H.R. 15268, 94th Cong., 2d Sess. (1976)	12
H.R. Rep. No. 721, Part 2, 95th Cong., 1st Sess. (1977) (supplemental report)	4, 9
H.R. Rep. No. 765, 97th Cong., 2d Sess. (1982) (conference report)	10
H.R. Rep. No. 1630, 94th Cong., 2d Sess. (1976)	9
Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976)	5
S. Rep. No. 580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 109	4, 5, 8-12, 21, 26, 28
TREATISES:	
J. Bonbright, *Principles of Public Utility Rates* (1961)	20
R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985)	20
2 A. Kahn, *The Economics of Regulation* (1971)	20
MISCELLANEOUS:	
Brief of Petitioner Florida Power Corporation Before the Eleventh Circuit (December 27, 1984)	7, 15, 27, 35
Paul Kagan Associates, Inc., *Cable TV Franchising* (October 14, 1985)	13, 14
Plaintiff's First Statement of Contentions and Proof, *United States* v. *AT&T Co.*, Civ. Action No. 74-1698, (D.D.C. November 1, 1978)	9

Table of Authorities-Continued

	Page
Staff Report, FCC Office of Plans and Policy (August 1977)	8
Television & Cable Factbook (Cable & Services Volume), No. 54 (1986)	13

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, from which this appeal is taken, appears at 772 F.2d 1537 and is reprinted at page 1a of the Appendix to Appellants' Jurisdictional Statement.[1] The memorandum opinion and order of

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[1] The Appendix to Appellants' Jurisdictional Statement will be cited as "App." The Joint Appendix has been prepared for use in both this proceeding and in No. 85-1658, and will be cited as "JA".

the Federal Communications Commission vacated by the Eleventh Circuit is unreported, and is reprinted at App. 18a. The memorandum opinions and orders of the FCC's Common Carrier Bureau that were left standing by the full Commission's order are unreported, and are reproduced at App. 25a and 32a.

JURISDICTION

This action began when three pole attachment rate complaints were filed against Florida Power Corporation with the Federal Communications Commission under 47 U.S.C. § 224. The FCC's Common Carrier Bureau substantially granted the relief requested in the complaints, and on September 28, 1984, the FCC denied Florida Power's applications for review of the Bureau's orders. App. 18a.

Florida Power then petitioned the United States Court of Appeals for the Eleventh Circuit for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). On October 8, 1985, the Eleventh Circuit vacated the FCC's order and held that the 1978 federal Pole Attachment Act violates the Fifth Amendment to the United States Constitution. App. 1a. On November 12, 1985, the Court of Appeals denied Appellants' petitions for rehearing and suggestions for rehearing en banc (App. 45a), and on November 21, 1985, the judgment was issued as mandate. App. 43a.

Notices of appeal were filed December 10, 1985, by Appellants (App. 47a), and on the same date by the FCC and the United States of America ("the Government"). Jurisdictional Statements were filed April 9, 1986, by Appellants (No. 85-1660) and by the Government (No. 85-1658). On June 2, 1986, this Court

noted probable jurisdiction and consolidated these two proceedings. Jurisdiction lies in this Court under 28 U.S.C. § 1252.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Pole Attachment Act is the popular name for the Communications Act Amendments of 1978, Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C.A. § 224 (West Supp. 1985)), and is reprinted at App. 49a.

STATEMENT OF THE CASE

Factual Background

As reflected in its legislative history, Congress passed the 1978 Pole Attachment Act to curb extortionate rates charged by public utilities to cable television operators for the use of surplus space on utility poles.

Cable operators transmit video programming to their subscribers through coaxial cables. Environmen-

tal and economic constraints[2] generally require that these cables be attached to available surplus space on existing utility poles used in the provision of utility service.[3] Electric and telephone utilities own and exercise exclusive control over these essential facilities by virtue of their government-authorized monopolies.[4]

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[2] Most communities will not permit cable operators to construct a duplicate set of poles, and installing cable equipment underground is often economically infeasible. *See, e.g.*, S. Rep. No. 580, 95th Cong., 1st Sess. 13 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 109, 121; H.R. Rep. No. 721, Part 2, 95th Cong., 1st Sess. 2-3 (1977) (supplemental report); *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Notice of Proposed Rulemaking*, 68 F.C.C.2d 3, 3 (1978) ("*Pole Attachment NPRM*").

[3] Under the Pole Attachment Act, the Commission has jurisdiction to regulate "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). This case involves only pole attachments, and to our knowledge the Commission has never been requested to regulate rates for cable attachments to utility conduit or rights-of-way under the Act.

In 1984 Congress passed legislation authorizing franchised cable operators to use easements "dedicated for compatible uses" so long as the owner of the property is compensated for any damages. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2786 (1984) (codified at 47 U.S.C. § 541 (Supp. II 1984)). The scope of this new provision has not been considered by the Commission and is not at issue in this case.

[4] Generally, power and telephone utilities share the same poles under joint use or joint ownership agreements, and both services are usually provided by a single pole line. Cable operators therefore usually have only one set of poles they can use to reach their subscribers. *See* S. Rep. No. 580, *supra* note 2, at 12; *Pole Attachment NPRM*, 68 F.C.C.2d at 3, 10.

As Congressman Van Deerlin put it, for cable operators the public utilities run "the only game in town."[5]

Most utility poles contain surplus space not currently required by the utility, but reserved for possible future utility use. Utilities across the country have long granted cable operators revocable licenses[6] to attach distribution cable to approximately one foot of this surplus space.[7] If no surplus space is available, the cable operator creates space at its own expense by adjusting the utility's wires or installing longer poles.[8] Because the cable operator pays for these "make-ready" adjustments, the cost to the utility resulting from cable attachments is negligible.[9]

Cable operators are required to make and maintain their attachments in a manner that does not conflict

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[5] *Pole Attachment: Hearings on H.R. 15372 and H.R. 15268 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 24 (1976).

[6] JA 118, 147 (§ 13.2) (a "mere revocable license").

[7] Congress found that "cable only physically occupies approximately 1 inch of this space * * *," and that under industry practice approximately another 11 inches of clearance is attributable to cable. S. Rep. No. 580, *supra* note 2, at 20.

[8] *See In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Memorandum Opinion and Order*, 77 F.C.C.2d 187, 191 (1980) ("*Pole Attachment Order*") ("under standard industry practice, all expenses directly related to the preparation of the poles for cable attachments are reimbursable independently of the rate formula"); *Communications Act Amendments of 1977: Hearings on S. 1547 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 28-29 (1977) ("*1977 Hearings*"); 123 Cong. Rec. 16695 (1977).

[9] S. Rep. No. 580, *supra* note 2, at 19.

with the use of the poles by any utility.[10] If pole space becomes inadequate for both cable and utility uses, under industry-wide contractual provisions the utility may reclaim the space, or require the cable operator to pay for taller poles.[11] Even where the cable operator has created new space by paying for taller poles, the utility continues to own the poles, and the new space used by the cable operator may be reclaimed if needed for utility service.[12] The FCC has recognized these contractual provisions,[13] and no utility has ever found it necessary to request the FCC's assistance in enforcing them.[14]

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[10] *See, e.g.*, JA 20, 106, 135, 215 (§ 2.2).

[11] *See* JA 20-22, 106-108, 135-137, 215-217 (§§ 2.2, 2.4); *1977 Hearings, supra* note 8, at 38.

[12] *Id.*

[13] *See In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—Memorandum Opinion and Second Report and Order*, 72 F.C.C.2d 59, 71 (1979) ("*Pole Attachment Second Report*"), *modified on other grounds*, 77 F.C.C.2d 187 (1980) (standard pole attachment agreements "make the [cable] operators responsible for all pole replacement costs necessitated by subsequent installation of additional electric or telephone lines"); *see also In re Petition To Adopt Rules Concerning Usable Space on Utility Poles*, 56 Rad. Reg. 2d (P & F) 707, 710 (1984) (cable operator pays "for a new pole if a taller pole is needed because of additional telephone or electric lines").

[14] The Act authorizes both cable operators *and* utilities to seek relief from oppressive pole rates, terms, and conditions. *See* 47 C.F.R. § 1.1402(e) (1985). The Commission recognizes, however, that typically it will be cable operators that seek relief in view of the utilities' monopoly control over utility poles. *See In re Adoption of Rules for the Regulation of Cable Television Pole Attachments—First Report and Order*, 68 F.C.C.2d 1585, 1593 (1978) ("*Pole Attachment First Report*").

For the use of this otherwise non-productive pole space, the cable operator pays the utility an annual fee. This fee has no effect on overall utility revenues.[15] If there is no cable attachment, the utility receives a return on its pole investment entirely from its general ratepayers as permitted by the relevant regulatory authority. If a cable operator attaches, the regulatory commission treats the attachment fee as an offset to the amount required from the utility's other customers to meet the utility's revenue requirement.[16]

During the early development of cable television, the rates charged for these arrangements reflected the slight cost attributable to the pole attachments.[17] But in the late 1950s—once the attachment of cable equipment to utility poles had become widespread—utilities began to exploit their monopoly ownership of this equipment by demanding much higher fees for

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[15] A utility's authorized revenues are referred to as its "revenue requirement," which is "[t]he total amount that a [utility] is entitled to charge for services * * *." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 106 S. Ct. 1890, 1896 (1986).

[16] *See Pole Attachment Order*, 77 F.C.C.2d at 191 ("cable rentals offset expenses which otherwise would be borne by the utility subscribers"); *1977 Hearings*, *supra* note 8, at 181 (testimony of Joseph Dowd on behalf of the Edison Electric Institute) (a pole fee "inures to the benefit of consumers of electricity, because it offsets operating expenses and in rate proceedings it [is] taken into account"). Even Florida Power acknowledges that pole attachment fees offset costs otherwise paid for by consumers of utility service. *See* Brief of Petitioner Florida Power Corp. Before the Eleventh Circuit, at 14, 37-39 (Dec. 27, 1984) ("Florida Power Brief").

[17] *1977 Hearings*, *supra* note 8, at 35-36.

pole attachment service.[18] Due to the utilities' local monopolies, their terms were not negotiable. The utilities themselves conceded that "[t]here was consultation and negotiation, but the figure proposed [by the utilities] was the figure accepted."[19] The utilities' abuse of their monopoly position has been thoroughly documented by Congress, the courts, the FCC and the Department of Justice.[20]

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[18] Some utilities, including the Bell system and the major independent telephone companies, first attempted to discontinue pole attachments altogether, proposing instead to construct the entire cable television distribution plant and to lease channel service to cable operators. *1977 Hearings*, *supra* note 8, at 36. Other utilities created subsidiaries to compete for cable franchises in markets where they controlled the poles. *Id.* These efforts to dominate the cable industry through monopoly control of cable distribution plant were frustrated by a series of FCC decisions, after which the utilities resorted to exorbitant pole attachment rate increases. *Id.* at 37-38. As explained by the Act's sponsor, utilities behaved "in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers." 123 Cong. Rec. 16694 (1977) (statement of Rep. Wirth).

[19] *1977 Hearings*, *supra* note 8, at 183 (testimony of Joseph Dowd on behalf of the Edison Electric Institute); *see also* Staff Report, FCC Office of Plans and Policy, at 34 (Aug. 1977), *quoted in* S. Rep. No. 580, *supra* note 2, at 13 ("public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates").

[20] *See, e.g., General Tel. Co. of the Southwest* v. *United States*, 449 F.2d 846, 850-851 (5th Cir. 1971); *United Tel. Co. of Pa.*, 40 F.C.C.2d 359, 361-368 (1973); *Better T.V., Inc. of Dutchess County, N.Y.*, 31 F.C.C.2d 939, 943-968 (1971), *modified on other*

Because most states were not regulating pole attachments,[21] cable operators initially sought relief from the FCC. The Commission ruled, however, that it lacked jurisdiction to regulate pole attachment arrangements.[22] Congress resolved this "jurisdictional impasse"[23] by enacting the 1978 Pole Attachment Act "[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public."[24]

The statute authorizes the FCC to set "just and reasonable" pole attachment rates that recover the utility's operating expenses and capital costs—including a reasonable rate of return[25]—attributable to the

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grounds, 34 F.C.C.2d 142 (1972); *TeleCable Corp.*, 19 F.C.C.2d 574, 578-591 (1969); *1977 Hearings*, *supra* note 8, at 26-45; *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 787-839 (1976); S. Rep. No. 580, *supra* note 2, at 12-13; H.R. Rep. No. 721, *supra* note 2, at 2-5; H.R. Rep. No. 1630, 94th Cong., 2d Sess. 4-6 (1976); 123 Cong. Rec. 16694-95, 35006-08 (1977); Plaintiff's First Statement of Contentions and Proof, *United States* v. *AT&T Co.*, Civ. Action No. 74-1698, at pp. 202-239 (D.D.C. Nov. 1, 1978).

[21] S. Rep. No. 580, *supra* note 2, at 14.

[22] *See California Water & Tel. Co.*, 64 F.C.C.2d 753 (1977).

[23] S. Rep. No. 580, *supra* note 2, at 14.

[24] *Id.*

[25] The Commission's usual practice has been to use the rate of return authorized by the relevant state utility commission. *See* 47 C.F.R. § 1.1404(g)(10) (1985). The Senate Report expressly authorizes, but does not require, reliance on the utility's

portion of the usable pole space used by the cable operator.[26] Although this methodology was initially subject to a five-year "sunset" limitation,[27] Congress subsequently repealed the sunset provision based on "evidence indicating the effectiveness of [the methodology]."[28]

The Commission is authorized to regulate pole attachment arrangements under the Act only where these services are not regulated by any state authority.[29] Congress viewed the regulation as an in-

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state-authorized rate of return. S. Rep. No. 580, *supra* note 2, at 22; *see Alabama Power Co.* v. *FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985).

[26] *See* 47 U.S.C. § 224(d)(1); S. Rep. No. 580, *supra* note 2, at 19-21. The Commission refers to this proportionate share of operating expenses and capital costs as "fully allocated costs." *Pole Attachment NPRM*, 68 F.C.C.2d at 8.

At a minimum, the statute guarantees that the utility will recover its "additional costs," or all costs that would not be incurred but for the pole attachment. *See* 47 U.S.C. § 224(d); *Pole Attachment NPRM*, 68 F.C.C.2d at 8 n.1. The Commission has made plain, however, that a complaint challenging a rate not higher than the utility's capital costs and operating expenses will be dismissed, *Pole Attachment NPRM*, 68 F.C.C.2d at 8, and it has set rates based on the utility's capital costs and operating expenses in virtually every case. *See Cablevision of Augusta, Inc.* v. *Georgia Power Co.*, File No. PA-83-0013, FCC Mimeo No. 3314, at ¶ 5 (FCC Common Carrier Bur. April 5, 1984).

[27] S. Rep. No. 580, *supra* note 2, at 21.

[28] H.R. Rep. No. 765, 97th Cong., 2d Sess. 31 (1982) (conference report); *see* Communications Amendments Act of 1982, Pub. L. No. 97-259, § 106, 96 Stat. 1087, 1091 (1982) (repealing sunset provision).

[29] *See* 47 U.S.C. § 224(c) (Supp. II 1984). When Congress

tegral part of state utility ratemaking and expressly contemplated eventual "replacement of interim FCC jurisdiction by the States and localities concerned with the orderly growth of cable television."[30] Shortly after the Act was passed, the FCC promulgated rules to describe the costs that are fairly attributable to cable attachments and to administer the streamlined complaint process envisioned by Congress.[31] The regulatory program has been reviewed and approved by both Congress and the courts.[32]

Although the Pole Attachment Act authorizes rate regulation, it does not mandate initial access to poles by cable operators. Utilities have traditionally—and voluntarily—permitted access because cable attach-

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was considering this legislation, only one state, Connecticut, actually regulated pole attachment arrangements. S. Rep. No. 580, *supra* note 2, at 14.

[30] S. Rep. No. 580, *supra* note 2, at 17.

[31] *See Pole Attachment Second Report*, *supra* note 13; *Pole Attachment First Report*, *supra* note 14; *Pole Attachment NPRM*, *supra* note 2.

[32] Since 1978 the Commission has resolved more than 200 pole attachment complaints filed under the Act. In 1984 Congress amended the Act to refine the regulatory relationship between the FCC and state agencies. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 4, 98 Stat. 2779, 2801-02 (1984) (codified at 47 U.S.C. § 224(c) (Supp. II 1984)). In 1981 the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's basic regulatory scheme, *see Monongahela Power Co.* v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (per curiam), and since then the FCC's ratemaking methodology has been subjected to rigorous judicial review. *See, e.g., Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th Cir. 1986); *Alabama Power*, 773 F.2d at 366-372. In none of these cases did the court even suggest that the Pole Attachment Act was constitutionally deficient.

ments offer an income-producing use of otherwise nonproductive surplus pole space.[33] The Act's history makes plain that no utility is required by the statute to permit cable operators to use its equipment:

> [The Act] does not vest within a [cable] system operator a right to access to a utility pole, nor does the [Act] require a power company to dedicate a portion of its pole plant to communications use.
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> * * * *
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> * * * FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. [S. Rep. No. 580, *supra* note 2, at 16.[34]]

The statute thus did not compel Florida Power or any other utility to enter pole attachment arrangements. Indeed, the Act applies to Florida Power only because the utility voluntarily agreed to permit cable attachments. *Id.* Moreover, Florida Power permitted the arrangements at issue knowing full well that its rates, terms, and conditions would be subject to FCC regulation.[35]

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[33] S. Rep. No. 580, *supra* note 2, at 16.

[34] The Commission has recognized that the Act does not mandate access. *Pole Attachment NPRM*, 68 F.C.C.2d at 13 ("[t]he legislative history clearly indicates that [the Act] does not grant a right of access to utility poles").

[35] Pole attachment legislation was introduced in Congress as early as August 1976 (*see* H.R. 15268, 94th Cong., 2d Sess. (1976)), and the Act was signed into law in February

The Commission's regulation of pole attachment arrangements affects more than 7500 cable television systems serving almost 40 million subscribers nationwide.[36] The Act influences even those systems in states that regulate pole attachments, because these states often rely on the FCC's ratemaking methodology in structuring their own regulatory schemes.[37] Pole attachment fees remain a significant cost factor for cable operators, approaching $90 million in 1985.[38] It has been estimated that these fees, if left unreg-

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1978. Florida Power entered its pole attachment contracts with Acton CATV in June 1980 (JA 104, 133), more than two years after the Act was passed. It entered its contract with Group W Cable's predecessors in July 1977 (JA 18), well after pole attachment legislation was introduced. The Cox Cablevision contract was entered into in 1963 by Florida Power and Cox's predecessor-in-interest for a term of at least one year, terminable thereafter at will on six months' notice. JA 213. Florida Power permitted the Cox Cablevision pole attachments throughout the entire period that pole attachment legislation was pending before Congress, and the arrangement continued until August 1985, at which time Cox sold the cable system governed by the contract. Thus, the utility voluntarily entered into or has continued the contracts at issue with full knowledge that its rates would be subject to FCC regulation.

[36] *See Television & Cable Factbook (Cable & Services Volume)*, No. 54, at A-45 (1986). At the time the Pole Attachment Act was passed, the cable television industry had invested more than $2 billion in distribution plant which was "literally hang[ing] on an estimated 10 million utility poles." *1977 Hearings*, *supra* note 8, at 28.

[37] *See, e.g.*, Cal. Pub. Util. Code § 767.5 (Deering Supp. 1986); N.Y. Pub. Serv. Law § 119-a (McKinney Supp. 1986); *In re Application of Ohio Edison Co. for an Increase in Rates*, Case Nos. 81-1171-EL-AIR, 82-559-EL-AAM (Ohio P.U.C. Nov. 3, 1982).

[38] *See* Paul Kagan Associates, Inc., *Cable TV Franchising*, at 3 (Oct. 14, 1985).

ulated, could quickly rise to more than $300 million annually.[39]

The Proceedings Below

Florida Power entered pole attachment contracts with Acton CATV in 1980, with Group W Cable's predecessors in 1977, and with Cox Cablevision in 1963, under which the cable operators paid annual rates in 1980 of $7.15, $6.24 and $5.50 per pole, respectively. App. 5a-7a. In late 1980 and 1981, these cable operators filed rate complaints with the FCC against Florida Power.[40] Acting on delegated authority, the FCC's Common Carrier Bureau found that Florida Power's pole attachment rates were not "just and reasonable" as defined in the Act. The Bureau reduced the rates to $1.79 per pole based on Florida Power's capital costs and operating expenses (App. 25a, 32a), including its state-authorized rate of return of 9.31 percent. App. 39a. On September 28, 1984, the full Commission denied Florida Power's applications for review, expressly rejecting the utility's contention that pole attachment regulation constitutes a taking under the Fifth Amendment. App. 18a.

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[39] *See id.* Florida Power argued before the FCC that an annual rate of $16.94 per pole was appropriate (App. 27a)—a rate almost ten times the $1.79 rate established by the Commission as just and reasonable. App. 29a, 39a.

[40] Complaints were filed on November 18, 1980, by Group W Cable's predecessors-in-interest, Teleprompter Corporation and Teleprompter Southeast, Inc. (JA 6); on February 20, 1981, by Acton CATV, Inc. (JA 96); and on November 2, 1981, by Cox Cablevision Corporation. JA 206.

On petition for review by the Eleventh Circuit,[41] no party requested that the Act be declared unconstitutional. In its brief to that court, Florida Power specifically stated that its "appeal [did] not involve a facial attack on the constitutionality of a legislative act." Florida Power Brief, *supra* note 16, at 35. Florida Power requested only that the specific rate set by the agency be set aside, and that the case be remanded to the FCC for a redetermination of a just and reasonable rate. *Id.* at 54. Nevertheless, the Eleventh Circuit, *sua sponte*, struck down the Pole Attachment Act as unconstitutional in a per curiam opinion on grounds neither briefed nor argued by any party.

The Court of Appeals first ruled that the Act authorizes a government-compelled permanent physical occupation of property and effects a taking *per se* under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). App. 8a-13a. The court did not reach Florida Power's contention that the specific rate set by the FCC was inadequate. Instead, it turned to the broader issue of the facial constitutionality of the Act. Although noting that "the FCC's Order did impose a rate which was arguably 'just' under the rule prescribed by Congress in the Act" (App. 2a), the Court of Appeals held that Congress may not delegate the determination of just compen-

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[41] The Eleventh Circuit designated Florida Power's petition for review of the Commission's September 1984 order as Case No. 84-3683. By order dated January 30, 1985, the Court of Appeals consolidated its review of the September 1984 order with its consideration of a similar Commission order also challenged by Florida Power (Eleventh Circuit Case No. 84-3904).

sation to an administrative agency, even if judicial review is available.

> Does the FCC, an administrative agency, have the power to determine what is or is not just compensation for purposes of the Fifth Amendment Takings Clause? In our opinion, it does not. [App. 13a.]

The Eleventh Circuit also stated that "Congress has usurped what has long been held an exclusive judicial function" by prescribing a statutory formula for just and reasonable pole rates. App. 16a. "Because the Act does not allow for a judicial determination of what constitutes just compensation," the court concluded, "it is in this court's opinion, unconstitutional." *Id.*

SUMMARY OF ARGUMENT

The 1978 Pole Attachment Act authorizes valid regulation of utility property dedicated to public service, and provides Florida Power a constitutional rate of return. The statute has no effect on Florida Power's overall revenue, but merely reflects a congressional adjustment of the contribution made by various utility customers to the utility's revenue requirement. Analysis under this Court's traditional takings criteria plainly shows that the Act does not constitute a taking of private property. And the narrow *per se* holding set forth in *Loretto* should not be applied to regulation designed to prevent abuse of a utility's government-authorized monopoly over facilities dedicated to public service.

Apart from *Loretto*'s inapplicability, its *per se* test is not satisfied here because cable operators are not

permanently attached to Florida Power's poles. Whenever pole space used by a cable operator is needed for utility service, Florida Power may require the operator to vacate the poles or to pay for new and taller poles. Unlike the landlord in *Loretto*, Florida Power has not been permanently dispossessed of any property, and no *per se* taking has occurred.

Furthermore, the Act does not effect a taking because Florida Power voluntarily permitted the pole attachments at issue with full knowledge that they would be subject to regulation. Unlike the statute addressed in *Loretto*, the Pole Attachment Act does not compel initial access by cable operators. The Act applies to Florida Power only by virtue of the utility's decision to permit cable attachments. Regulation of such voluntary business conduct is not a taking requiring the payment of just compensation.

Finally, even if there were a taking, Congress has not violated the Takings Clause by authorizing an administrative agency to determine just compensation in the first instance. Every pole attachment rate set by the FCC is subject to review by the courts and may be vacated if constitutionally inadequate. The Act itself does not fix a predetermined compensation ceiling, but authorizes the FCC to establish a rate of return consistent with the utility's investment-backed expectations. Long-standing precedent makes plain that administrative agencies may calculate just compensation for takings so long as judicial review is available.

ARGUMENT

I. Regulation Of Utility Poles Under The Pole Attachment Act Does Not Effect A Taking.

A. Pole Attachment Regulation Constitutes Proper Regulation of Utility Facilities and Guarantees Florida Power a Constitutional Rate of Return.

This Court held in *Loretto* that a government-compelled permanent physical occupation of an apartment building roof was a taking *per se*. 458 U.S. at 426. In describing *Loretto*'s "very narrow" holding (*id.* at 441), the Court suggested that it should be applied only when the physical occupation at issue is "of such a *unique* character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 432 (emphasis added). Despite this limitation, the Eleventh Circuit has used *Loretto* to strike down commonplace regulation of utility property.

It has been settled for more than a century that the government may regulate rates charged for use of a bottleneck facility by other businesses.[42] Such regulation has often included requiring utilities to permit physical attachments to their facilities at regulated rates.[43] For example, electric utilities like Florida

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[42] *See Munn* v. *Illinois*, 94 U.S. 113, 126-132 (1877) (upholding rate regulation of grain elevator operators who "stand * * * in the very 'gateway of commerce,' and take toll from all who pass"); *see also Nebbia* v. *New York*, 291 U.S. 502 (1934).

[43] *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 375-377 (1973) (court may order interconnection of electric transmission system to prevent abuse of utility's monopoly control of distribution facilities); *Gainesville Utils. Dep't* v. *Florida Power Corp.*, 402 U.S. 515, 521-529 (1971) (FPC may require electric utility to interconnect its system with another utility at

Power are required to permit private cogenerators, at regulated rates, to connect to their plant.[44] Telephone utility property must likewise endure physical attachments.[45]

The justification for such regulation of utility property is self-evident. The government provides a public utility with monopoly control over distribution plant, eminent domain power, and other economic benefits

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prescribed rates, terms and conditions); *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 507-508 (1942) (noting FPC authority to order physical connections between gas transportation facilities); *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 411-412 (1912) (requiring railroad association to permit non-member railroads to use terminal facilities on reasonable terms and conditions); *Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708, 722-724 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1171 (1985) (upholding ICC authority to require rail carrier to give access to terminal facilities and tracks to other carriers).

[44] *See, e.g., American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 418-423 (1983); *Kansas City Power & Light Co.* v. *State Corp. Comm'n*, 238 Kan. 842, 715 P.2d 19 (1986).

[45] *MCI Telecommunications Corp.* v. *FCC*, 580 F.2d 590, 594-600 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (requiring telephone company to furnish local physical interconnections to specialized common carrier); *Bell Tel. Co. of Pa.* v. *FCC*, 503 F.2d 1250, 1254-63 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (FCC may require interconnection of communication common carriers); *General Tel. Co. of the Southwest*, 449 F.2d at 853-860 (FCC may require telephone companies wishing to provide leased channel service to make pole or conduit space available to cable operators); *Guardband Decision*, 12 F.C.C.2d 841, *recon. denied*, 14 F.C.C.2d 269 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969) (establishing rules requiring interconnections between telephone companies and radio common carriers).

not afforded private businesses.[46] In exchange for this favored position in the marketplace, and to avoid abuse of the utility's government-authorized monopoly over utility plant, utility facilities are subject to attachments by other parties.[47] Regulation of the use of utility property is constitutional so long as the utility is given an opportunity to earn a non-confiscatory return.[48]

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[46] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 756-757 n.11 (1968); 2 A. Kahn, *The Economics of Regulation* 113-171 (1971); J. Bonbright, *Principles of Public Utility Rates* 10 (1961).

[47] Professor Richard Epstein, who contends that most rate regulation violates the Takings Clause, acknowledges the propriety of utility rate regulation. *See* R. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 274-276 (1985). Indeed, he provides an additional justification for such regulation. Because utilities achieve their monopoly position in part through takings of private property, the Takings Clause requires that its monopoly status be put to a "public use." *See, e.g.*, Fla. Stat. Ann. § 361.01 (West 1968) (granting Florida utilities eminent domain power). If a utility were permitted to exploit its legal monopoly, its investors would benefit disproportionately from the utility's eminent domain power in violation of the public-use requirement. Epstein, *supra*, at 274-276.

[48] Because utilities are generally regulated by state authorities, utility regulation is often analyzed under the Fourteenth Amendment Due Process Clause, through which the Fifth Amendment Takings Clause has been applied to the states. *See Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 122 (1978). Regardless of whether regulation of utility property is analyzed under the Takings Clause, the Fifth Amendment Due Process Clause, or the Fourteenth Amendment Due Process Clause, the key inquiry is whether the utility has an opportunity to recover a non-confiscatory return. *Compare Panhandle E. Pipe Line Co.* v. *FERC*, 777 F.2d 739, 744 (D.C. Cir. 1985) ("[t]he Fifth Amendment to the Constitution protects companies only from a rate so confiscatory as to be a taking"), *with Denver Union*

The Pole Attachment Act constitutes valid regulation designed to prevent abuse of a utility's monopoly control over utility poles. Poles are typically placed on public rights-of-way or on property the utility has acquired through the exercise of eminent domain. To avoid visual blight, most municipalities prohibit the construction of new, duplicative pole lines, and require cable operators to use existing poles.[49] Recognizing that denial of access to surplus pole space would deprive the consumer of cable television service, utilities across the country have voluntarily granted pole attachment licenses to cable television systems. As a consequence, television viewers are able to receive a greater variety of programming, and utilities are able to make productive use of surplus pole space, the cost of which otherwise would be borne solely by customers of electric or telephone service.

The urgent need for Congress to regulate pole attachments arose when the utilities sought to exploit their monopoly control of poles. The utilities' exorbitant increases in pole attachment charges threatened the economic survival of an important interstate communications service. Because both the FCC and the states had disclaimed jurisdiction,[50] a congres-

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Stock Yard Co. v. *United States*, 304 U.S. 470, 475 (1938) ("[a]s of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates * * * sufficient to yield a reasonable rate of return") *and Board of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 31 (1926) ("[t]he just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return"); *see generally FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense").

[49] *See* note 2, *supra*.

[50] *See* S. Rep. No. 580, *supra* note 2, at 14.

sionally authorized federal forum for resolving pole rate disputes was required. Far from the unique circumstances in *Loretto*, the pole attachment controversy presented Congress with a classic case for the type of federal regulation of utility plant that has passed constitutional review for decades.[51]

The propriety of pole attachment regulation is further established under this Court's modern takings analysis. In deciding whether such regulation effects a taking, the Court has "eschewed the development of any set formula * * * and [has] relied instead on ad hoc, factual inquiries into the circumstances of each particular case."[52] Three factors have " 'partic-

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[51] Utility property can, of course, be the subject of an unconstitutional taking. A taking might well occur where the government appropriates fee title in utility property, or where the utility property at issue is not a bottleneck facility (*e.g.*, an office building). The Fifth Amendment is not violated, however, by non-confiscatory regulation required to prevent abuse of the utility's government-authorized control over pole space, an unintended bottleneck to the provision of cable services. Stated differently, a non-confiscatory return constitutes the utility's just compensation for regulation of the use of its property, as opposed to a taking of the property itself. *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 671 (1935) ("where by legislation prescribing rates or charges the use of the [utility] property is taken, just compensation assured by [the Constitution] is a reasonable rate of return") (footnotes omitted); *Los Angeles Gas & Elec. Corp.* v. *Railroad Comm'n*, 289 U.S. 287, 305 (1933) (where utility retains ownership of property, just compensation for regulation of property is fair return); *see also Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 352 (1951) (Frankfurter, J., concurring) (requirement that utility provide service is an unconstitutional taking only if the regulated rate is confiscatory); *Panhandle E. Pipe Line*, 777 F.2d at 744 (same).

[52] *Connolly* v. *Pension Benefit Guar. Corp.*, 106 S. Ct. 1018,

ular significance:' (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'"[53]

Pole attachment regulation has no economic effect on Florida Power, and interferes with no investment-backed expectations. The utility's revenue requirement is set by the Florida Public Service Commission. Through fees paid for their use of surplus pole space, cable operators contribute to the utility's revenues which would otherwise be entirely recovered from utility service consumers. Pole attachment rate regulation merely adjusts the allocation of pole costs and return between cable systems and utility ratepayers, a task undoubtedly within the province of Congress.[54] The Act does not affect the utility's overall revenues and does not deprive the utility of a non-confiscatory return on its poles.

The Court of Appeals held below that the third factor—the character of the government action—was dispositive. Citing *Loretto*, the Eleventh Circuit concluded that the Act effects a taking *per se* because the regulated service involves a physical attachment

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1026 (1986) (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979)).

[53] *Connolly*, 106 S. Ct. at 1026 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124); *accord MacDonald, Sommer & Frates* v. *Yolo County*, 54 U.S.L.W. 4782, 4784 (U.S. June 25, 1986); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 82-83 (1980).

[54] *See, e.g., National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 462 U.S. 810 (1983); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

to utility facilities. App. 8a-13a.[55] If, however, *Loretto*'s narrow *per se* rule were applied to regulation of the use of utility plant, utility regulation would raise a constitutional issue at every turn. Simply put, *Loretto* was never intended to apply to regulation of utility facilities required to prevent exploitation of the utility's government-authorized control over those facilities. By striking down the Act, the Eleventh Circuit has improperly frustrated clear congressional policy to prevent such abuse, and has called into question similar regulation that involves minor physical attachments to utility equipment by private businesses.[56]

B. *Loretto*'s *Per Se* Test Is Not Satisfied Here Because Florida Power's Pole Space Has Not Been Permanently Occupied.

Even if *Loretto*'s narrow *per se* holding could properly be applied to regulation of the use of utility plant, it would be inapplicable here because there has been no permanent attachment to Florida Power's poles. The contractual arrangements between Florida Power and cable operators—which are typical of industry-wide practices—provide that:

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[55] Florida Power did not (and could not plausibly) argue before the Eleventh Circuit that the Act effects a taking under this Court's traditional multifactor balancing test.

[56] This Court has frequently stated that *per se* rules under the antitrust laws should not be extended to a new business practice unless the judiciary has had "considerable experience" in striking down that practice under the rule of reason. *E.g.*, *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 9 (1979); *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 607-608 (1972). The experience this Court has had in upholding utility regulation like the Pole Attachment Act clearly counsels against application of a *per se* takings rule in this case.

- In return for its annual fee, the cable operator receives only a "mere revocable license"[57] to use surplus space on utility poles.

- The cable operator must vacate immediately if the space it occupies is needed for either telephone or electric utility service.

Far from permanently occupying Florida Power's poles, cable operators have, at best, a revocable license.[58]

Loretto involved a state statute requiring apartment owners to permit equipment to be permanently placed on the roofs of their buildings. 458 U.S. at 421. This Court held that such a government-compelled permanent occupation of property is a taking *per se* requiring just compensation. *Id.* at 426, 441. *Loretto* defined a "permanent occupation" as one that forever deprives the owner of the basic rights of possession, occupation, and control.

> First, the owner has no right to possess the occupied space himself, and also has no power

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[57] JA 118, 147 (§ 13.2).

[58] In lieu of vacating the poles, the cable operator might be permitted to purchase new poles that are tall enough to accommodate both cable and the increased demands of the utility. As frequently happens, however, the cable operator may not be able to afford the substantial expense of purchasing new poles. And even where the cable operator buys new poles, it continues to pay annual attachment fees and may still be required to vacate the new surplus space if subsequently needed for telephone or power service. *See* pages 5-6, *supra*.

> to exclude the occupier from possession and use of the space. * * * Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. [*Id.* at 435-436; citations omitted; footnote omitted.]

Unlike the statutory scheme addressed in *Loretto*, not a single requirement of the *per se* test is present in this case. Florida Power continues to control the use of its property, and may repossess and occupy the space used by a cable operator any time that space is needed for utility service.[59]

Nothing in the Commission's current regulatory program diminishes a utility's right to reclaim pole space when needed for utility service. Certainly the FCC may prevent a utility from evicting a cable operator when the utility's intent is to circumvent the Commission's jurisdiction over pole attachment rates.[60]

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[59] In *Loretto* the Court relied (458 U.S. at 428) on the "closely analogous" case of *St. Louis* v. *Western Union Tel. Co.*, 148 U.S. 92 (1893), where the occupation at issue—the placement of telegraph poles on city streets—was "an exclusive and permanent one." *Id.* at 98. There, the city could exact reasonable compensation because "the use made by the telegraph company * * * effectually and permanently dispossess[ed] the general public as if it had destroyed that amount of ground." *Id.* at 99. In contrast, Florida Power has not been permanently dispossessed of its pole space, but may reclaim that space whenever necessary to provide utility service.

[60] *See* S. Rep. No. 580, *supra* note 2, at 16; *Pole Attachment First Report*, 68 F.C.C.2d at 1589; *Pole Attachment NPRM*, 68 F.C.C.2d at 13.

But whatever minimal restriction on the utility's use of its equipment is caused by the Commission's regulation, the utility's ability to reclaim pole space used by a cable operator when needed for utility service—as opposed to circumventing the Commission's jurisdiction—makes this case fundamentally different from *Loretto*. Because *Loretto*'s *per se* rule does not apply, pole attachment regulation must be analyzed under the traditional balancing test for takings. And, as described above, such an analysis shows that pole attachment regulation does not effect a taking.

The Court of Appeals below improperly rewrote the "very narrow" holding in *Loretto* from one requiring a *permanent* physical occupation to one requiring merely a *direct* physical occupation.[61] In *Loretto*, however, this Court specifically distinguished cases involving rent control statutes with guaranteed tenancies and other temporary occupations, stating, "[i]n none of these cases * * * did the government authorize the permanent occupation of the landlord's property by a third party."[62] Where, as here, the

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[61] App. 12a ("to the extent that a permanent physical occupation includes some element of permanency, we conclude that the instant case satisfies that element as set forth in *Loretto*"). The Eleventh Circuit adopted this interpretation of *Loretto* at the urging of Florida Power. *See* Florida Power Brief, *supra* note 16, at 24 ("[p]ermanent physical occupation [under *Loretto*], in short, means a direct physical attachment, not an occupation which must last forever").

[62] *Loretto*, 458 U.S. at 440. Rent control regulation often prohibits retaliatory eviction, but such provisions have never been held to be a taking of property, even after *Loretto*. *See, e.g., Troy Ltd.* v. *Renna*, 727 F.2d 287, 291-292, 301-303 (3d Cir. 1984) (rejecting *Loretto* challenge to rent control statute creating 40-year guaranteed tenancies); *Rivera* v. *R. Cobian Chinea &*

government has not compelled a permanent occupation of property, *Loretto*'s narrow holding is plainly inapplicable.

C. The Act Effects No Taking Because Florida Power Voluntarily Permitted the Pole Attachments at Issue, Knowing That They Would Be Subject to FCC Regulation.

Unlike the state statute addressed in *Loretto*, the Pole Attachment Act does not mandate access.[63] And unlike the landlord in *Loretto*, who never consented to the placement of cable on her roof,[64] Florida Power voluntarily permitted its pole attachment arrangements. It is hornbook utility law that, unlike private businesses, a utility's contracts are subject to an implied condition that the rates may be superseded by regulation where the public interest so requires.[65]

Co., 181 F.2d 974, 977 (1st Cir. 1950) ("it was within the power of the Legislature to regulate the procedure for the eviction of tenants * * * in view of the fact that such procedure might be availed of by landlords to circumvent the maximum rent ceilings"); *Fisher* v. *City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, 106 S. Ct. 1045 (1986) (upholding rent control statute providing for indefinite guaranteed tenancies); *Nash* v. *City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed for want of substantial federal question*, 105 S. Ct. 1740 (1985) (same); *Terminal Plaza Corp.* v. *City & County of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986) (same); *Flynn* v. *City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981).

[63] *See, e.g.*, S. Rep. No. 580, *supra* note 2, at 16.

[64] *See Loretto*, 458 U.S. at 422-424.

[65] *See, e.g., Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937) ("the State has the power to annul and supersede rates previously established by contract between

Where a party acts voluntarily knowing that its actions are subject to regulation, that regulation does not effect a taking. For example, a 1978 federal statute permits the Environmental Protection Agency to disclose certain confidential data submitted to that agency. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court held that disclosure of such data submitted before the statute took effect might be a taking requiring just compensation. *Id.* at 1010-13. But for data submitted *after* the effective date of the statute, disclosure does not constitute a taking. *Id.* at 1005-08.[66]

Just as Monsanto knew that data submitted to EPA after the effective date of the statute in *Ruckelshaus* might be disclosed, Florida Power as a public utility knew that its pole attachment arrangements were subject to regulation. The utility permitted existing arrangements to continue, and entered new arrangements even after the Pole Attachment Act was passed.[67] As in *Ruckelshaus*, it should not be permit-

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utilities and their customers") (footnote omitted); *Trans World Airlines, Inc.* v. *City & County of San Francisco*, 228 F.2d 473, 477 (9th Cir. 1955), *cert. denied*, 351 U.S. 919 (1956) (utility contracts "are subject to a condition implied in law that rates and charges may be superseded by utility regulation").

[66] Under a law passed in 1972, Monsanto could protect from disclosure its confidential data submitted to EPA by designating the data as trade secrets. The 1978 statute eliminated Monsanto's protection. The Court held that, for data submitted prior to 1972 or after 1978, EPA's disclosure does not effect a taking. Disclosure of data submitted between 1972 and 1978, however, might constitute a taking. *Ruckelshaus*, 467 U.S. at 1004-14.

[67] Florida Power contends that—although its initial decision to permit attachments was entirely voluntary from 1963 through at least June 1980—its pole attachment arrangements are no

ted to argue now that the Act effects a taking of property.

The Fifth Amendment requires the payment of just compensation for takings of private property "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). This Court has held, however, that compensation need not be paid where Congress regulates private arrangements that the regulated party voluntarily entered. *See Connolly*, 106 S. Ct. at 1027 (no taking where employers who voluntarily maintained pension plan were statutorily required to pay share of vested obligations upon with-

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longer voluntary because it may not terminate these arrangements in retaliation for rate complaints under the Act. The Eleventh Circuit likewise stated that while the cable operators were invited at unregulated rates, attachments "at the rate specified by the FCC is anything but invited." App. 9a-10a. But these contentions fail to recognize that the very purpose of the Pole Attachment Act—and utility regulation generally—is to prevent utilities from exacting monopoly profits from a government-authorized bottleneck. If utilities were permitted to withhold pole attachment service except upon the payment of monopolistic rates, there could be no effective rate regulation.

Cable operators have invested substantial sums in cable systems attached to utility poles as a result of the utilities' voluntary decision to permit them to do so. Florida Power should not now be permitted to circumvent valid rate regulation simply because it would prefer to charge monopolistic fees. Unlike the landlord in *Loretto*—who was compelled by statute to "suffer[ ] [the] special kind of injury when a *stranger* directly invades and occupies the owner's property" (458 U.S. at 436; original emphasis)—Florida Power agreed to the attachments at issue and coerced extortionate pole fees for years. It cannot now object to regulation of the rates, terms, and conditions charged for this service.

drawing from plan); *Ruckelshaus, supra*. Thus, no taking results from congressional regulation of Florida Power's pole attachment arrangements.

II. Congress May Authorize An Administrative Agency To Determine Just Compensation For A Taking, Subject To Judicial Review.

Even if the Pole Attachment Act effected a taking, it would not be unconstitutional simply because it authorizes an expert administrative agency to determine the utility's just compensation in the first instance. The statute directs the FCC to determine a "just and reasonable" rate for pole attachment service. To streamline Commission procedures and to ensure some measure of uniformity, Congress set forth a formula for just and reasonable rates based on the utility's capital costs and operating expenses, a typical utility ratemaking standard. All Commission determinations under the Act are subject to judicial review, as evidenced by this very case.[68] Under the Administrative Procedure Act, a United States Court of Appeals may vacate any pole attachment rate set by the Commission if the rate violates a constitutional or statutory right, or is arbitrary, capricious or an abuse of discretion.[69]

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[68] Parties before the FCC may petition for review of a final Commission decision under 47 U.S.C. § 402(a). The United States Courts of Appeals have exclusive jurisdiction over such petitions under 28 U.S.C. § 2342(1).

[69] *See* 5 U.S.C. § 706(2). Although the Commission is usually able to calculate a just and reasonable rate based on the written submissions of the parties, it may engage in whatever evidentiary proceedings are necessary to effectuate its mandate under the Act. *See* 47 C.F.R. § 1.1411 (1985); *Pole Attachment First Report*, 68 F.C.C.2d at 1600.

The text of the Fifth Amendment states only that "private property [shall not] be taken for public use, without just compensation"; it does not prohibit administrative agencies from aiding in the determination of just compensation. This Court has long held that agencies like the FCC may determine just compensation when review by the courts is available:

> By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; *but may be entrusted by Congress to commissioners appointed* by a court or *by the executive*, or to an inquest consisting of more or fewer men than an ordinary jury. [*Bauman* v. *Ross*, 167 U.S. 548, 593 (1897); emphasis added; citations omitted.]

Indeed, in eminent domain proceedings, the assessment of just compensation by "a commission, or board, * * * or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal Constitution that it has been held repeatedly that * * * when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given." *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922) (citations omitted). Numerous decisions of this Court,[70] the United States

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[70] *E.g.*, *MacDonald, Sommer & Frates*, 54 U.S.L.W. at 4784 ("a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to pro-

Courts of Appeals,[71] and state courts of last resort[72] confirm that Congress may authorize an agency to determine just compensation, subject to judicial review.[73]

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vide"); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123-131 (1950) (upholding agency determination of ceiling price of pepper as just compensation for taking of pepper); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 694-695 (1897) (just compensation may be awarded "by commissioners, at least where there is provision for a review of their proceedings in the courts"); *United States* v. *Jones*, 109 U.S. 513, 519 (1883) (just compensation may be determined by "commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate"). *See generally The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. 1186 (1973).

[71] *E.g.*, *Chicago & N.W. Transp. Co.* v. *United States*, 678 F.2d 665, 668-671 (7th Cir. 1982) (upholding ICC determination of just compensation for taking of railroad property); *Monongahela*, 655 F.2d at 1256-57 (approving FCC's basic regulatory scheme under Pole Attachment Act and thus implicitly upholding Commission's authority to set pole attachment rates); *United States* v. *Hess*, 71 F.2d 78, 79-80 (8th Cir. 1934) (non-judicial tribunal may set just compensation); *see also Latvian State Cargo & Passenger S.S. Line* v. *United States*, 88 F. Supp. 290, 291-292 (Ct. Cl. 1950) (administrative agency may determine in the first instance just compensation for takings under Merchant Marine Act).

[72] *E.g.*, *Marin Mun. Water Dist.* v. *Marin Water & Power Co.*, 178 Cal. 308, 314-316, 173 P. 469, 470-472 (1918) (legislature may authorize state railroad commission to determine just compensation); *State* v. *Heppenheimer*, 54 N.J.L. 268, 271-273, 23 A. 664, 665 (1893) (governor may appoint commissioners to ascertain just compensation subject to judicial review); *George* v. *Consolidated Lighting Co.*, 87 Vt. 411, 419-420, 89 A. 635, 638 (1914) (public service commission may determine just compensation); *State ex. rel. Andrews* v. *City of Oshkosh*, 84 Wis. 548,

Nor is the Pole Attachment Act constitutionally infirm simply because it sets forth a formula to be used by the FCC in its determination of a "just and reasonable" pole rate. This methodology does not establish a predetermined compensation ceiling, as the Eleventh Circuit suggested (App. 16a). To the contrary, the statute permits the utility to recover all costs attributable to the pole space used by the cable operator, as well as a reasonable return on the utility's investment in that space. And the FCC has authority to set the rate of return at a level such that there is no confiscation of the utility's property.[74]

566-569, 54 N.W. 1095, 1100-01 (1893) (board of public works may determine just compensation subject to judicial review).

[73] The Eleventh Circuit's contravention of this Court's binding precedent is betrayed by the very case on which it so heavily relies, *Loretto*. On remand of *Loretto* from this Court, New York's highest court directed the State Commission on Cable Television to determine just compensation. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 153, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983). The New York Court of Appeals specifically rejected the argument that the United States Constitution prohibits the initial determination of just compensation by an administrative agency. *Id.*; *accord Princeton Cablevision, Inc.* v. *Union Valley Corp.*, 195 N.J. Super. 257, 270, 478 A.2d 1234, 1241 (1983) (compensation for *Loretto*-type taking should be set by board that oversees state cable television industry).

[74] *Alabama Power*, 773 F.2d at 372. In any event, even statutory ceilings for just compensation are valid where, upon judicial review, they are deemed to satisfy the Takings Clause. *See, e.g., United States* v. *Cors*, 337 U.S. 325, 331-334 (1949) (upholding statutory definition of just compensation as "coterminous" with constitutional requirement); *Bauman*, 167 U.S. at 573-575 (upholding congressional requirement that just compensation for taking of land for highway be reduced by benefits resulting from highway to any land not taken); *Troy*, 727 F.2d

The utility parties requested the court below to review the pole attachment rate set by the FCC to ensure that it is constitutional.[75] The Eleventh Circuit declined to do so and held instead that agencies can play no role in the determination of just compensation, relying primarily on *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).[76] But this Court has expressly stated that *Monongahela* stands only for the proposition that just compensation—like all constitutional issues—is *ultimately* a judicial inquiry, and that congressional standards of just compensation are subject to review by the courts:

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at 300 ("[u]ntil the district court analyzes the compensation features of the statutory scheme to determine whether the level of [controlled rent] is adequate, it cannot find an uncompensated taking"); *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980) (statutory standards "can be applied to a claim for just compensation if * * * reasonable and judicially acceptable").

[75] Florida Power does not challenge the rates set by the FCC as confiscatory in the traditional sense, or its state-authorized rate of return as constitutionally inadequate. Instead, it argued below that pole attachment regulation effects an unconstitutional taking unless the utility is allowed to recover the rate it was able to coerce before the statute was enacted. Florida Power Brief, *supra* note 16, at 27-33. But this anomalous theory turns utility rate regulation on its head, and would plainly defeat the very purpose of such regulation: to prevent abuse of the utility's government-authorized monopoly control over utility facilities.

[76] In *Monongahela* the Court was concerned because the legislature both bought the property at issue and set the purchase price. 148 U.S. at 327. Here, there is no similar self-interested congressional action, and thus no due process or fairness concerns are raised. The FCC acts as a disinterested arbiter in determining a proper and just rate for pole arrangements entered into by two private parties. Neither Congress nor the FCC is acting as judge in its own case, as in *Monongahela*.

> *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands.[77]

This Court recently admonished against rigid, formalistic limitations on the authority of administrative agencies.[78] The pole rate methodology set forth in the Act simplifies Commission procedures, and assures that a uniform standard of "just and reasonable" compensation is applied to the hundreds of utilities whose poles are regulated. Although the statutory formula and the FCC's orders may be reviewed to

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[77] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974). There, the contention was made that Congress may not "specify the form of [just] compensation but must leave the decision to the judiciary." *Id.* This Court rejected the argument as "based upon an erroneous reading of [*Monongahela*]." *Id.*

The three lower court cases cited by the panel below similarly provide no support for its holding. In *Miller* v. *United States*, the Court of Claims specifically held that legislative guidelines for determining just compensation may be upheld if "reasonable and judicially acceptable." 620 F.2d at 837. Another case, *United States* v. *15.3 Acres of Land*, 154 F. Supp. 770 (M.D. Pa. 1957), was subsequently reversed by the Third Circuit (264 F.2d 112 (3d Cir.), *cert. denied*, 361 U.S. 819 (1959)), and in any event the District Court affirmed a determination of just compensation set by a commission. 154 F. Supp. at 788. In *American-Hawaiian S.S. Co.* v. *United States*, 124 F. Supp. 378 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955), the court held only that administrative determinations of just compensation are subject to judicial review, not that agencies may never set just compensation in the first instance.

[78] *See Thomas* v. *Union Carbide Agricultural Prods. Co.*, 105 S. Ct. 3325, 3334-39 (1985).

ensure their constitutionality, the Eleventh Circuit's unprecedented refusal to do so improperly handcuffs Congress, and might require the federal judiciary to become a ratemaker in the first instance for pole attachment disputes, as well as for other regulatory schemes deemed to effect a taking of property. Nothing in the Takings Clause requires this anomalous result. The Court's long-standing precedent plainly permits agencies like the FCC to set just compensation where, as here, judicial review is available.[79]

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[79] Even where the right to judicial review is limited or withheld, federal agencies may set just compensation for takings due to the availability of a claim under the Tucker Act. *See Ruckelshaus*, 467 U.S. at 1016-20. *A fortiori*, the FCC may set Florida Power's compensation here, where full judicial review is available.

CONCLUSION

For the reasons expressed above, we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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